No. 981752 APR 28 1999

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In The
Supreme Court of the United States

October Term 1998

**GRANDEOTTO, INC., a corporation;
BERNARD J. and KATHY A. FOLIO;
MID-CITY LAND CO.;
BERNARD J. FOLIO, d/b/a Highrise Associates;
KATHRYN FOLIO; JOSEPH FOLIO ,**

Petitioners,

v.

CITY OF CLARKSBURG, a municipal corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WEST VIRGINIA

Petition for Writ of Certiorari

Thomas G. Eddy
Counsel of Record
EDDY & OSTERMAN
Manor Building Penthouse
564 Forbes Avenue
Pittsburgh, PA 15219
(412) 281-5336

Counsel for Petitioners

THE LEX GROUP • 1205 East Main Street • Suite 2 East • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3256

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QUESTIONS PRESENTED

1. Did the West Virginia Supreme Court's refusal to address Petitioner's federal due process and equal protection claims and refusal to apply federal constitutional law in disposition of such claims contravene the Supremacy clause? (U.S. Const. Art. VI, Cl.2).

2. Does an unlawful taking of property occur, or is federal due process otherwise offended, when a state government taxes its citizens for proprietary government services in direct contravention to its constitution, but calls it a fee, when the revenue measure has already been determined to be a tax under federal constitutional law? (U.S. Const. Amd XIV)

3. Is the fire service charge per se discriminatory and thus in violation of federal equal protection because it cannot be enforced against the federal government and its instrumentalities as a matter of federal constitutional law, and has not been enforced against various other entities? (U.S. Const. Amd. XIV)

4. Does federal equal protection and specifically, rational basis testing, require some identifiable relationship between residential and commercial property owners and the use of fire services to justify the invidiously disproportionate charges imposed upon them? (U.S. Const. Amd. XIV).

PARTIES TO THE PROCEEDING

The parties to the proceedings below at Case No. 25143 were as the caption appears. B.J. Folio, Inc. is the parent company of Grandeotto, Inc. and Mid-City Land Company.

Additional parties were the City of Huntington, West Virginia, Appellee, and The Most Reverend Bernard W. Schmitt, Bishop of the Roman Catholic Diocese of Wheeling-Charleston, Appellants at Case No. 25401; and The Wheeling College, Inc., The Most Reverent Bernard W. Schmitt, Bishop of the Diocese of Wheeling- Charleston, Appellants, and The City of Wheeling, West Virginia, Appellee, and The City of Wheeling, West Virginia, Appellee and The Ohio County Board of Education, Appellant at Case No. 25402. The Cases at No. 25401 and 25402 were consolidated with this action (No. 25143) by Motions to Intervene and to Consolidate which were granted by the West Virginia Supreme Court of Appeals.

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I. CITATIONS TO AND DECISIONS AND OPINIONS OF THE COURTS BELOW

The Memorandum of Decision and Order of the Circuit Court of Harrison County, West Virginia (A 46) is unreported[1].

The Per Curium Opinion of the West Virginia Supreme Court of Appeals affirming the Circuit Court and the Dissenting Opinions thereto (A 1, 15), as well as the Orders granting certiori (A 28), intervention and consolidation (A 23, 26) and denying rehearing (A30)and stay of mandate (A 19) are unreported as of the date hereof.

The Order (A 62) and Memorandum of Opinion and Order (A 58) of the District Court granting the City of Clarksburg's F.R.C.P. 12(b) Motion to Dismiss Petitioner's 28 U.S.C. §1983 action under the Tax Injunction Act (28 U.S.C.§1341) are unreported.

The Opinion of the Fourth Circuit Court of Appeals affirming the U.S. D.C. for the Northern District of West Virginia dismissing Petitioners' parallel 28 U.S.C. § 1983 action is published at 134 F3d. 1211 (4th Circuit, 1998) (A 33). The Order of the Fourth Circuit denying Appellants' Petition for Rehearing and Suggestion for Rehearing En Banc is unreported (A 30).

II. JURISDICTION

The Per Curium Opinion of the West Virginia Supreme Court of Appeals was entered on December 15, 1998 (A 1). That Court denied a timely Petition for Rehearing on January 28, 1999 (A 30). Jurisdiction in this Court is invoked pursuant to 28 U.S.C. §1251 and 1257.

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[1] "A___" references are to the separately bound Appendix volume filed herewith. "R.R." references, infra, are to the separately bound reproduced record filed with the West Virginia Supreme Court.

III. CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

(A) Article VI, Clause 2 of the Constitution of the United States (A 103) provides in pertinent part:

> "This Constitution and the laws of the United States which shall be made in pursuant thereof... shall be the supreme law of the land; and the judges of every state shall be bound thereby; anything in the Constitution or laws of any state to the contrary notwithstanding."

(B) Section 1 to the Fourteenth Amendment to the Constitution of the United States (A 104) provides, in pertinent part:

> "[n]or shall any state deprive any person of... property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(C) The Fifth Amendment to the Constitution of the United States (A 102) provides in pertinent part:

> "No person shall [be]... deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(D) West Virginia Code §8-13-13 (A 105) provides in pertinent part:

> "[n]otwithstanding any charter provision to the contrary, every municipality which furnishes an essential or special municipal

service, including... fire protection, shall have plenary power and authority.... to impose by ordinance upon the users of such services reasonable rates, fees and charges to be collected in the manner specified in the ordinance."

(E) The Codified Ordinances of the City of Clarksburg at No. 92-4, §957.11 (A 107) provides in pertinent part:

	Fire Fee Protection Service
Owner - residential unit structure	$60.00 per year
Owner - duel residential unit structure	$60.00 per year
Owner - multiple family residential unit structure	$.045 x gross square feet-minimum $36.00/per year (Total number of sq. feet contained in the structure times four and one-half cents (.045) per year)
Owner - non-residential unit structure	$.045 x gross square feet-minimum $36.00 per year (Total number of sq. feet contained in the structure times four and one-half cents (.045) per year)

Non-residential tenant unit structure	$.225 x gross square feet-minimum $36.00 per year (Total number of sq. feet contained in the structure times four and one-half cents (.045) per year)

IV. STATEMENT OF THE CASE

A. STATEMENT OF MATERIAL FACTS

Petitioners are all landowners of property situate within the City of Clarksburg who have been subjected to the Ordinance[2] (A 105) . The Ordinance was enacted pursuant to West Virginia Code 8-13-13 (A 105). This Code section authorized local governments to enact ordinances for the imposition of reasonable "fees" upon the "users" of municipal services to defray certain municipal operating costs, in this case, the Ordinance was enacted to fund the City's cost of fire protection services.

As applied to this case, the Ordinance extracts a charge from owners and lessees of real property located within the City in varying amounts depending upon the owner's or lessee's classification as a "user" of fire services and the square footage of the premises owned or leased. Additionally, and although the Ordinance is silent on this point, 50% of the fees are apparently imposed for the ownership or possession of any personal property located within any given structure (RR. Vol. I, p. 209; RR Vol. II, p. 252). The residential and non-residential classifications contained in the Ordinance were not created on the basis of the costs of fire protection associated with any particular classified "user", or any other identifiable criteria. Lawsuits

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[2] The term "Ordinance" as used herein, includes all enactments by the City of Clarksburg pursuant to W.Va. Code 8-13-13 which were the subject matter of the proceedings in the State Courts.

were initiated by the City of Clarksburg against the Petitioners for the collection of fire service "fees" assessed against them during the period 1990-1993. It is not disputed that the Ordinance imposes said "fees" utilizing a square footage method of assessment (A 6), and that if the "fees" are really "taxes", then the same are unlawful as proscribed by the Tax Limitation Amendment to the West Virginia Constitution (W. Va. Const. Art. 10, §1).

B. STATE COURT JUDGMENTS/ FEDERAL CONSTITUTIONAL ISSUES

Petitioners attempted to challenge said "fees" defensively in state Court, raising, inter alia, both due process and equal protection claims under the United States Constitution in their Answers to the Complaints filed against them. The Circuit Court of Harrison County ultimately granted Summary Judgment in favor of the City of Clarksburg and denied Petitioner's Motion for Summary Judgment under W. Va. R.C.P. 56 (A 47,56). A Petition for Allowance of Appeal was granted by the West Virginia Supreme Court of Appeals by a 4-1 vote (A 28). Prior to oral argument thereon, the parties at Case Nos. 25401 and 25402 successfully intervened, and their cases were consolidated with the instant case for disposition (A 23, 26). By a 3-2 vote, the West Virginia Supreme Court affirmed the Courts below in all three consolidated cases (A 14).

In all three cases, the West Virginia Supreme Court majority ignored the parties' federal substantive due process and equal protection claims (U.S. Const. Amd. XIV), thus failing to apply federal constitutional law thereto. Instead, the Court reiterated its prior holding in City of Huntington vs. Bacon, et al. 196 W. Va. 457, 473 SE2d 743 (1996) (A 1, 2, 13) which held that as a matter of state constitutional law only, a municipal fire service charge which is based on the square footage method of assessment extracts "user fee" and not a "tax" from its respective subjects. In Bacon, the Court

refused to apply the Fourth Circuit's ruling in U.S. vs. Huntington, 999 F.2d 71 (CA 4, W. Va. 1993) Cert. Den. 114A. S.CT 1048, 127 L.Ed 371 (1994) (A 76), wherein the Court found as a matter of federal constitutional law, that such a charge is a "tax in the most classic sense of the term" and "a thinly disguised tax" (A 97, 99)[3].

This Petition is limited to the federal constitutional issues raised below concerning substantive due process (taxation) and equal protection (arbitrary classifications). With respect to taxation, two Justices of the West Virginia Supreme Court in their dissenting opinions, labeled the revenue measure "a wolfish tax which is cloaked in the garb of a sheepish fee." (A 15)[4] . With respect to equal protection, it is a given that the Ordinance cannot be enforced against the federal government and its instrumentalities (U.S. vs. Huntington, supra), and has not been enforced against various other entities.

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[3] It is not and has never been disputed that the Clarksburg and Huntington Ordinances are "essentially indistinguishable" (A 1, 44) in the context of taxation. The Clarksburg Ordinance however, because it creates arbitrary classifications of users who are charged different "fees", implicates equal protection beyond the foregoing statement.

[4] The City of Clarksburg admitted that if the revenue measure constitutes a "tax", then the same would violate the W.VA Tax Limitation Amendment (W.Va. Const. Art. X §1, A 110). In the context of taxation, there is no substantive distinction between this case and Case Nos. 25401, 25402, which cases were consolidated with this case for disposition. The Huntington, Wheeling and Clarksburg Ordinances are all based on the square footage method of assessment. The Grandeotto, et al. Appellants are not immune from taxation by virtue of W. Va. Code 11-3-9, but by virtue of W Va. Const. Art. X, §1. Justice Maynard's dissent, although correct in its substantive analysis, is incorrect in its conclusion that "there is no reason the Appellants in Case No. 25143 should not pay the 'fee' at issue, since unlike churches and schools, they are not exempted under W. Va. Code 11-3-9. Dissent, Maynard, J. at p. 1, fn. 1.(A 15).

C. UNITED STATES COURT JUDGMENTS/ FEDERAL CONSTITUTIONAL CLAIMS

In an effort to secure the state court's loyalty to the United States Constitution, Petitioners initiated a parallel[5] federal civil rights action (28 U.S.C. §1983) in the United States District Court for the Northern District of West Virginia, Folio, et al. v. City of Clarksburg, 134 F.3d (4th Cir., 1998) (A 33). In said District Court action, the same due process and equal protection violations were alleged. That action was dismissed by the District Court on the City's F.R.C.P. 12(b) Motion (A 62), which Motion invoked the Tax Injunction Act (28 U.S.C. §1341) as a basis for lack of subject matter jurisdiction. An appeal to the Fourth Circuit Court of Appeals ensued.

In said appeal Appellants argued that the Fourth Circuit, applying principles of federal constitutional law in U. S. vs. City of Huntington, supra, has already determined that the City of Huntington's Ordinance imposed an unlawful tax on property owners located within the City of Huntington. The Opinion by the Fourth Circuit in U. S. vs. Huntington, supra, is diametrically opposed to the West Virginia Supreme Court's ruling in City of Huntington vs. Bacon, supra and this case. Thus, the Fourth Circuit, applying federal constitutional law, (U. S. vs. City of Huntington, supra at p. 73 citing, inter alia, U.S. vs. Allegheny, 322 U.S. 174, 184; 64 S.Ct. 908, 914; 88 L.Ed 1209 (1944) has held that the service fee imposed by the City is a "tax in the most classic sense of the term" and "a thinly disguised tax" (A 97, 99), while the highest West Virginia state court, applying state constitutional law only, has held the measure to be a lawful "fee" (A 77). Petitioners' argued

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[5] In the State Court actions, which were consolidated at No. 93-C-609-2, the City sued Petitioners for fees due during the period 1990-1993. In the District Court action, Petitioners sought a Declaratory Judgment concerning the fees for the period 1993-1996.

that the Tax Injunction Act (28 U.S.C. §1341) should not preclude federal court jurisdiction in that case because no "adequate" remedy was available in the West Virginia State Courts to adjudicate Petitioners' federal constitutional claims[6]. Petitioners further argued that the City should be estopped to claim the "fees" are "taxes" in federal court to defeat federal court jurisdiction, only to claim the "taxes" are really "fees" in state court under the auspices of Bacon, supra. In a published opinion, the Fourth Circuit affirmed the district court (cite, A 45) but held:

> "This court has previously considered an essentially indistinguishable West Virginia municipal ordinance imposing fire service protection fees, and there we concluded that it constituted a tax within the meaning of the Tax Injunction Act because liability for the fee was based upon a resident's property owner status instead of his use of the city service. See City of Huntington, 999 F.2d at 73-74. We are not able to distinguish the fire service protection fee at issue her from the one the court studied in City of Huntington, and, as did that court, we conclude that the fee is a tax for purposes of the Tax Injunction Act (A 44; emphasis added).

A Petition for Rehearing was subsequently denied (A 30). As previously stated, the West Virginia Supreme Court, while it exercised its discretionary jurisdiction over this case,

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[6] There is no Appellate Court system in West Virginia. Review by the West Virginia Supreme Court is discretionary. Declaratory judgment actions are discretionary. The City of Clarksburg has even unlawfully created a "Fire Service Appeals Board", which under the Ordinance now purports to constitute an aggrieved taxpayers sole and exclusive remedy of right Ordinance at § 957.16 (cf: A 42)

then proceeded to ignore Petitioners' federal due process and equal protection claims.

D. REASONS FOR GRANTING THE WRIT

Intervention by this Court is necessary to resolve a controversy which goes to the very core of the purpose for the enactment of the Fourteenth Amendment - to protect the fundamental federal constitutional rights of the citizens of a state from arbitrary and oppressive actions of state government. In this case, the West Virginia Supreme Court completely ignored Petitioner's duly asserted federal constitutional rights, reaching a determination under state law only, which determination is the polar opposite of that reached by the Fourth Circuit on an identical issue and under federal constitutional law in any event.

This case is not about a state court and federal court reaching diametrically opposed results on an identical issue under state law and federal law respectively where no federal constitutional rights are involved. Where federal constitutional rights are involved, state courts are bound by federal constitutional law. Had the West Virginia Supreme Court applied federal constitutional law to Petitioners' federal rights, the result would have been a ruling in their favor.

This Court is truly a court of last resort. Petitioners have attempted to invoke the safeguards of their federally protected rights not only in state court to no avail, but also in the parallel Federal District Court action under 28 U.S.C. §1983 where their claims were squarely defeated under the Tax Injunction Act. Intervention is necessary, otherwise it is certainly fair to conclude that Petitioners' federal constitutional rights are only illusory; that is to say they are rights without remedies.

V. ARGUMENT

(A): Did the West Virginia Supreme Court's refusal to address Petitioners' federal due process and equal protection claims and refusal to apply constitutional law in disposing of such claims contravene the Supremacy clause? (U.S. Const. Art. VI, Cl. 2).

Just as federal courts are often obligated to apply rules of decision provided by state law, see Erie Railroad Co. v. Thompkins, 304 U.S. 64, 58 S. Ct. 817 (1938), the Supremacy Clause of the U.S. Constitution requires state courts to apply federal law wherever appropriate. U.S. Const. Art. VI, Cl. 2 (A 103); see also Public Service Comm'n of Utah, v. Wycoff Co., Inc., 344 U.S. 237, 247-48, 73 S.Ct.236, 242 (1952) ("State courts are bound equally with the federal courts by the Federal Constitution and laws."). When appropriate, the U.S. Constitution is the "supreme Law of the Land." U.S. Const. Art. VI; see also W.Va. Const. Art. I, §3.

The West Virginia Supreme Court had "a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [were] protected'". See Felder v. Casey, 487 U.S. 131, 151, 108 S.Ct. 2302, 2313-14 (1988) (quoting Garrett v. Moore-McCormack, Co., 317 U.S. 239, 245, 63 S. Ct. 246, 251 (1942)). In the absence of a "valid excuse", the West Virginia Supreme Court was obligated to consider the federal claims put before it. See Howlett v. Rose, 496, U.S. 356, 369-70, 110 S.Ct. 2430, 2439-40 (1990).

The West Virginia Supreme Court's failure is not "excused" for any of the potential reasons identified by the Howlett Court. Said Court did not point to any "neutral rules of judicial administration", (see Howlett 496 U.S. at 374-75, 110 S.Ct. at 2442), nor did it suggest a lack of jurisdiction to

consider the Petitioners' claim. See id. at 369-70, 110 S. Ct. at 2439-40; cf: Folio v. City of Clarksburg (Petitioners' parallel action, holding that the West Virginia courts offer adequate remedies to taxpayers raising federal constitutional challenges to the validity of a tax). The West Virginia Supreme Court should have addressed the Petitioner's constitutional claims.

By failing to address the federal constitutional issues presented in the consolidated appeals, this Court has left this case in the same procedural posture as that reviewed by the United States Supreme Court in Allegheny Pittsburgh Coal vs. County Commissioners of Webster County, W. Va., 488 U.S. 336, 109 S.Ct. 633 (1989). In said case, the United States Supreme Court granted certiori to consider the federal issues never addressed by the West Virginia Supreme Court. 488 U.S. at 342, 109 S. Ct. at 637. Ultimately, the United States Supreme Court held that the County's purchase value assessment method violated the equal protection clause of the 14th Amendment, reversed this Court, and struck down the Webster County assessment methodology as a matter of federal constitutional law. Id. at 346, 109 S. Ct. at 639. As in Allegheny Pittsburgh Coal, the West Virginia Supreme Court has manifestly overlooked the presence of federal constitutional claims and issues, which it was obligated to consider.

(B): Does an unlawful taking of property occur, or is federal due process otherwise offended when a state government taxes its citizens for proprietary government services in direct contravention to its constitution, but calls it a fee, when the revenue measure has already been determined to be a tax under federal constitutional law? (U.S. Const. Amd XIV)

Federal Due Process

The very touchstone of due process is the protection of individuals against arbitrary actions of government. Wolff vs. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, (1974). The Fourteenth Amendment does not operate to deprive states of their lawful power and of the right to resort to reasonable methods inherently belonging to the power exerted. The provisions of the due process clause only restrain "... those arbitrary and unreasonable exertions of power which are not really within lawful state power..." American Land Co. vs. Zeiss, 219 U.S., 67, 31 S. Ct. 200 (1911) (emphasis added). For purposes of the Fourteenth Amendment, actions by a municipality are deemed actions of the state Lovell vs. Griffin, 303 U.S. 444, 58 SCt. 666 (1938).

In a federal due process law analysis, only the determination of whether Appellants have a "property interest" is a matter of state law. "If a property interest is found to exist, the second question - what process is due - is a matter of federal law". Kovats vs. Rutgers, 749 F.2d 1041 at 1047 (3rd Cir., 1984) citing Memphis Light, Gas and Water Division vs. Craft, 436 U.S. 1, 98 S. Ct. 1554, 56, L.Ed 2d 30 (1978); U.S. Const. Amd. V, XIV. To arbitrarily label the municipal charges for fire services under the City of Clarksburg Ordinance as "fees" is an arbitrary and unreasonable exertion of municipal and thus state power,

which operates to deprive Petitioners of their property as a matter of federal due process.

The Huntington cases are intriguing (A 63, 94). It seems extraordinary for a federal circuit court applying federal constitutional law to summarily and without reservation label the charges imposed under the Ordinance as "a tax in the most classic sense of the term" and "a thinly disguised tax" (A 97, 99), while in juxtaposition, a state Supreme Court justifies a polar opposite conclusion under principles of state constitutional law only, ignoring both federal constitutional law and logic (A 77).

As the following discussion will demonstrate, the "thinly disguised tax" was thinly distinguished by the West Virginia Supreme Court of Appeals, and the instant case is governed by and controlled by U. S.vs. City of Huntington, supra, or federal constitutional law which in any event yields the same result.

As stated, the West Virginia Supreme Court of Appeals distinguished City of Huntington v. Bacon, supra, from U. S. v. City of Huntington, supra, solely on the basis that no federal right was asserted by the Plaintiffs in the former, while a federal right (ie., the Supremacy Clause) was asserted in the latter:

> "Where a federal right is involved, a federal court is not bound by the characterization given to a state tax by a state court nor relieved from the duty of considering the real nature of the tax and its effect on the federal right asserted." City of Huntington v. Bacon, supra at p. 11; Hartford County, 512 F. Supp. at 242 (citing Carpenter v. Shaw, 280 U.S. 363 at 367-368, 50 S. Ct. 121 at 122-123 (1930); United States v. Allegany 322 U.S. 174, at 184; 64 S. Ct. 908 at 914 (1944).

* * *

> "It follows, therefore, that a state court is not bound by a federal court's characterization of a state tax or fee when a federal right is not involved. After all, as we have previously stated, states are free to determine their own fiscal policy as long as the fiscal policy does not violate the constitution of the United States" City of Huntington vs Bacon, supra (A76).

Because no federal constitutional rights were in issue, the West Virginia Supreme Court decided the case pursuant to state law only. Under federal due process, said Court was bound by federal constitutional law, and the Fourth Circuit's characterization of this revenue measure as a tax (id.).

The same operative federal substantive law provisions were invoked by the West Virginia Supreme Court in this case to avoid the application of federal constitutional law and U.S. vs. Huntington (A 13), constituting the only explanation for the Court's short-changing of Petitioners' federal constitutional arguments:

> "The Bacons and the Board of Education were found to be subject to the fee even though the federal government was not obligated to pay pursuant to the Supremacy Clause, Article VI, Clause 2 of the U.S. Constitution. By way of explanation, this Court stated:
>
> > [Where a federal entity is involved, the federal courts may determine a particular funding mechanism employed by a state or its political sub-division is, in fact, a tax[.] It follows, therefore, that a state

> is not bound by a federal court's characterization of a state tax or fee when a federal right is not involved. After all, as we have previously stated, states are free to determine their own fiscal policy as long as the fiscal policy does not violate the Constitution of the United States (citation omitted).
>
> Bacon at 464-65., 473 S.E. 2d at 750-51. The Fourth Circuit's holding did not apply to the Bacons or the Board of Education. The same is true for the appellants in the case sub judice. (emphasis added) (A 13).

Numerous citations appear in the above-quoted excerpt taken from the opinion in Bacon, as well as other federal constitutional law provisions which, when genuinely analyzed, make it abundantly clear and dispel the notion that the ruling in U.S. vs. Huntington is not confined to "federal entities" asserting "federal rights".

According to the West Virginia Supreme Court, the federal government is entitled to a determination that the "fee" is not a "tax", while private citizens are not, arguably because the holding in U.S. vs. Huntington, supra, is limited to a federal entity asserting its federal right not to be taxed by a state government under the Supremacy Clause. The Court's tacit approval of a "dual system" of federal rights, is not only nonsensical, but is contrary to the most basic and fundamental underpinnings of both the Fourteenth Amendment to the U.S. Constitutional and the Supremacy Clause.

Quite plainly, the Supremacy Clause stands for the proposition that the federal constitution and federal laws

supersede any law of any state which seeks to restrain their scope and/or are inconsistent therewith (see discussion (A), supra).

In the seminal case of McCullogh vs. Maryland, 17 U.S. (4Wheat) 316, 4 L.Ed 579 (1819), the United States Supreme Court determined that, as a matter of federal constitutional sovereign immunity, states are without power to tax the federal government. Because the federal constitution is the supreme law of the land under the Supremacy Clause, the state law seeking to impose a tax on the federal government must yield thereto. (see also United States vs. Hartford County, 572 F. Supp. 239 (1983), cited by the Court in Bacon, supra, at 473 SE2d 750, where the first issue, as in U.S. vs. Huntington, was whether the revenue measure constituted a tax). The federal right involved in these cases was the sovereign immunity of the federal government, which federal immunity superseded any effort by the state to tax the federal government under and by virtue of the Supremacy Clause.

"Federal rights" however, include due process and equal protection under the Fourteenth Amendment (U.S. Const. Art. XIV), which extend to each and every citizen of every state. As applied to this case, the Fourteenth Amendment was enacted to extend the fundamental right of due process as contained in the Fifth Amendment to the U.S. Constitution (A 102) to all citizens of all states:

> "The Fourteenth Amendment legitimately operates to extend to citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty and property as is afforded by the Fifth Amendment against similar legislation by Congress." Hibben vs. Smith, 191 U.S. 310, 24 S. Ct. 88, 48 L.Eed. 195 (1903); Paul vs. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed

2d 405, reh. den. 425 U.S. 985, 96 S.Ct. 2194, 48 L.Ed2d 811 (1976) (A 76).

The following passage from the Opinion in Bacon, supra, leaves no doubt that the West Virginia Supreme Court fully understood and acknowledged that a 'federal right' is not limited to the "immunity provided to the federal government and its instrumentalities":

> "The only limitations the Supreme Court of the United States may impose upon a state's power to determine its own fiscal policies are those expressed in the Constitution of the United States (citing Kentucky Union Co. vs. Kentucky, 219 U.S. 140, 51; 31 S.Ct. 171, 176, 55 L.Ed 137, 154 (1911). One such limitation expressed in the Constitution of the United States is that the federal government is not subject to any taxation by a state or political subdivision unless explicitly authorized by congress (emphasis added; citing McCullogh vs. Maryland, supra and Hartford County, supra).

That a "federal right" is not limited to one asserted by a federal entity was equally disposed of by the West Virginia Supreme Court by virtue of the foregoing passage, and by virtue of its citation of Kentucky Union Co., supra and Wisconsin vs. J.C. Penney, 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed 267 (1940); Bacon, supra at 473 S.Ed 2d 750, which cases involve a state's legitimate police power to tax private persons.

With or without the holding in U.S. vs. Huntington, supra, the same result would occur. For purposes of federal constitutional, statutory and common law, the question of whether a particular charge is a "tax" is determined by reference to federal law rules of decision. In U. S. vs. City

of Huntington, supra, the court looked to federal law in concluding that the defendant city's "municipal services fee" was a tax from which the federal government was immune. And in Carpenter v. Shaw, supra, the Court looked to federal law to determine whether a state-imposed tax on oil and gas royalties was invalid as applied to the petitioner because it was inconsistent with a granted tax exemption.

The question of whether the fire service charge levied by the City of Clarksburg is a "tax" is properly a question of federal law. Under federal law, federal courts assume that a service fee based solely upon some potential use, rather than actual use of a municipality's fire services is a tax. See id.

The difference between a "tax" and a "fee" was very clearly explained by the Court in U.S. vs. Huntington under principles of federal constitutional law:

> "Users fees are payments given in return for a government-provided benefit. Taxes, on the other hand, are 'enforced contribution[s] for the support of government'. United States vs. La Franca, 282 U.S. 568, 572 51 S. Ct. 278, 280, 75 L.Ed. 551 (1931). Liability for the 'user fee' charged by the City arises from GSA's and USPS's status as property owners and not from their use of a City services. See Michelin Tire Corp. vs. Wages, 423 U.S. 276, 287, 96 SD. Ct. 535, 541, 46 L.Ed. 2d 495 (1976) ['Ad valoeum] property taxes are taxes by which a State apportions the cost of such service as police and fire protection among the beneficiaries according the their respective wealth...')." (A 99).

If fees are not closely tied to "use", as opposed to "ownership" of property, the dangers are great: "Fire and flood protection and street maintenance are core governmental services... Under the theory advanced by the

City, virtually all of what are now considered 'taxes' could be transmuted into 'user fees' by the simple expedient of dividing what are generally accepted as taxes into constituent parts eg., a police fee".(id at A 98-99).

That the Service Fee is a tax, rather than a fee, for the purposes here is made even more clear by the following analytical model upon which the Fourth Circuit in Folio vs. City of Clarksburg, supra, relied:

> [Courts] have sketched a spectrum with a paradigmatic tax at one end and a paradigmatic fee at the other. The classic "tax" is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community. The classic "regulatory fee" is imposed by an agency upon those subject to its regulation. It may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive. Or, it may serve such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses.

123 F. 2d at 800 (quoting San Juan Cellular Telephone Co. v. Public Service Comm'n, 967 F.2d 683, 685 (1st Cir. 1992).

Consistent with this logic, the Service Fee is obviously a tax. The Service Fee is assessed pursuant to a general ordinance of the City, rather than as any sort of special assessment by the City's fire department itself. It is levied on each non-federal property owner without regard to that individual's actual use of fire services. It is clearly collected for the benefit of the entire community, and it offered no evidence that it has ever expended any funds at all

in either providing fire prevention services to the Petitioners or extinguishing any fires on those properties. Thus, for purposes of federal law, the Service Fee is a "tax", the imposition of which constituting a palpably arbitrary exercise of the City of Clarksburg's police power, and a denial of federal due process. Kovats, supra at 1047; J. C. Penney, supra, at 249; Village of Norwood vs. Baker, 172 U.S. 269, 19 S.Ct. 187 at 193 (1898).

Petitioner's contend that the West Virginia Supreme Court was thus nonetheless constitutionally steered to the Fourth Circuit's conclusion:

> "We are unable to discern any relevant difference between the square footage method of assessment and the ad valorem method. The service fee is a thinly disguised tax." id. at 74.

The assertion of Petitioner's due process right is one of much substance, and is conceptually identical to the right asserted in Norwood, supra.

In that case, the Village of Norwood, Ohio, enacted an Ordinance assessing upon Appellee Baker's land, abutting on each side of a new street, an amount covering not simply a sum equal to that paid for the land taken for the street, but in addition, the costs and expenses connected with the condemnation proceeding. "The Plaintiff's suit proceeded upon the ground, distinctly stated, that the assessment in question was in violation of the Fourteenth Amendment, providing that no state shall deprive any person of property without due process of law... as well as the bill of rights of the Constitution of Ohio." id at 190. This Court initially noted that ... "the assessment of the abutting property for the cost and expenses incurred by the Village was an exercise of the power of taxation", and that "except for the provision of the Constitution of Ohio above-quoted, the state could have authorized benefits to be deducted from the actual value of

the land taken without violating the (United States Constitution)" id.

The Court in Norwood, quoting from Williams vs. Eggleston, 170 U.S. 304, 18 S.Ct. 619, went on to state:

> "Neither can it be doubted that if the State Constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement. But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go, consistently with the citizen's right of property." id.[7]

Norwood is conceptually indistinguishable from the instant case: In Norwood, the City claimed that the assessment was a legal "tax" under Ohio law, while the appellee maintained that the revenue measure was outside the police power to tax, proscribed by the Ohio Constitution, and constituted a taking of property without due process of law because the "tax" bore no relationship to the benefits received.

In the instant case, the City claims that the assessment is a legal "fee" under West Virginia law, while Petitioners maintain that the revenue measure was outside the police power to exact a fee, proscribed by the West Virginia Constitution, and constitutes a taking of property

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[7] "The views we have expressed are supported by other adjudicated cases, as well as by reason, and the principles which must be recognized as essential for the protection of private property against the arbitrary action of government" Norwood, supra at 19 S.Ct. 192.

without due process of law because the "fee" bears no relationship to quantum of use.

As aptly re-stated by the Court in Norwood:

> "If a sovereign breaks open the strongbox of an individual...and takes out money... it looks to me very much like a direct taking of private property for public use. It certainly cannot alter the case to call it 'taxation'." id at 193.

In passing on the federal constitutional validity of the Ordinance, the Circuit Court, and then the United States Supreme Court affirming, found that the assessment was... "in violation of the Fourteenth Amendment of the Constitution of the United States, forbidding any state from depriving a person of property without due process of law." id. at 187, 191.

In the instant case, the revenue measure is a "tax", its exaction is admittedly not within the lawful police powers of the City of Clarksburg (W. Va. Const. Art. X, §1; W. Va. Code 8-13-13) and it constitutes a taking of property without due process of law in violation of the Fourteenth Amendment. Village of Norwood, supra. In this context, this case is absolutely indistinguishable from any other case where a state or political subdivision thereof, exceeds its jurisdictional power to tax (eg., a foreign corporation by virtue of the commerce clause, or the federal government by virtue of federal immunity).

(C): Is the fire service charge per se discriminatory and thus in violation of federal equal protection because it cannot be enforced against the federal government and its instrumentalities as a matter of federal constitutional law, and has not been enforced against various other entities? (U.S. Const. Amd XIV)

The Equal Protection clause protects private parties against legislation or regulation that is (1) discriminatory on its face, see eg., City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 450, 105 S.Ct. 3249, 3260 (1986) (invalidating special use permits not required for others), or (2) is adopted with discriminatory intent, see e.g. Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064 (1886) (invalidating municipal ordinance the effect of which was to force Chinese-owned laundries out of business) or, (3) although facially neutral, is enforced in a discriminatory manner, see eg., Allegheny Pittsburgh Coal Co. v. County Commissioners of Webster County , supra, (invalidating county property tax assessment system that "select[ed recent transferees of real property] out for discriminatory treatment by subjecting [them] to taxes not imposed on other members of the same class"; quoting Hillsborough v. Cromwell, 326 U.S. 620, 623, 66 S.Ct. 445, 448 (1946)).

As a matter of federal constitutional law, the City must exclude the federal government from the service charge. This practice raises the same concerns that this Court found to be unacceptable in Allegheny Pittsburgh Coal, supra, wherein it was held that, given the structure of West Virginia's system of taxation, the county's assessments violated the Equal Protection Clause. This Court carefully pointed out that the Equal Protection Clause could tolerate short delays in the fair application of tax rates, id., at 343, 109 S. Ct. at 638, and that the states were generally free to create reasonable classes of taxpayers and assign differing

tax burdens to each of those classes, id, at 344, 109 S. Ct. at 638. West Virginia law, however, was devoid of any provision suggesting that recent purchasers of property would be taxed any differently than persons who had owned their property for some period of time, or that the State's counties had the power to create such classes. Id. at 345, 109 S.Ct. at 638-39. The County's assessment system, therefore, could not withstand equal protection scrutiny.

The City's scheme for assessment of the service fee charge suffers from the same flaws found to be fatal in Allegheny Pittsburgh Coal. There is no dispute that Petitioners are immune from any obligation to pay "taxes" to the City on the properties involved here, (W. Va. Const. Art. X, §1) (A 110) and that the City does not collect the service charge from entities of the federal government. Both the federal government and Petitioners are immune from taxation - one pays and one does not.

As in Allegheny Pittsburgh Coal, this de facto discrimination is unsupported in State law. The West Virginia Legislature did not distinguish property owners such as Petitioners from the federal government. Instead, under W. Va. Code §8-13-13, the Legislature created one class of potential "users" subject to the tax. Nothing in the text of that section or its history would support tax treatment of federal property in a manner any different from the treatment of any other property [8]. The West Virginia Supreme Court firmly establishes this principle in Bacon:

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[8] Even if under federal law the service charge is a "user fee" in this context, the City's practice still could not withstand scrutiny W.Va. Code 8-13-13 recognizes no classes and contains no suggestion that federal property should be exempt therefrom. The Allegheny County Pittsburgh Coal Court cautioned that local governments cannot create classifications unless authorized to do so by state law. See 488 at 345, 109 S. Ct. at 639. In any event, the City has made absolutely no effort to classify federally owned property differently from property owned by any other person or entity.

> "The consensus of opinion appears to be that a property tax is a charge on the owner of property by reason of his ownership alone without regard to any use that might be made of it" (citing, inter alia, Bromley v. McCaughan, 280 U.S. 124 136, 50 S.Ct. 46, 47; 74 L.Ed 226 (1929)... The Bacons and the Board focus on the above definition in isolation which can often be misleading. For example, in this case, the City imposed its municipal service fee on the primary users of its flood and fire protection services. These primary users happen to be property owners. Thus, the City did not impose the municipal fee on owners of property by reason of their ownership alone. Instead, the fee is imposed upon the property owner by reason of their use of fire and flood protection services. Therefore, the municipal service fee is not a tax in this instance." (A 82).

Moreover, the West Virginia Legislature has failed to heed the warning of the Bacon Court, in apparent recognition of the effect of the Fourth's Circuit's decision in U. S. v. City of Huntington:

> "We make the above holdings with reservations [which] should not open the floodgates to creative financing so that a municipality fees a citizen to death, thereby doing exactly what the Tax Limitation Amendment... sought to prevent. For this reason, we strongly encourage the legislature to.. attempt to more explicitly define the authority of municipalities to impose user fees or charges so as to protect our state citizens. The legislature should specifically

> list whom, it anyone is exempt from paying the user fee. If and when the legislature *makes such a list, it should be mindful of the* provisions of the West Virginia Constitution, such as our equal protection provision."

473 S. E. 2d at 757 (A 91-92). As a result, the service fee must be assessed against all property owners, which it is not. In addition to the federal government, instrumentalities of state, county and city government have also been systematically immunized from enforcement of the Ordinance (see eg., Depo., P. Shives, RR. Vol. I at p. 131, 136, 145; A 10, 11)

Because W. Va. Code 8-13-13 does not provide for the exclusion of any person or entity from the service charge, the Ordinance is per se discriminatory, or has been applied in a discriminatory manner in violation of equal protection.

> **(D): Does equal protection, and specifically, rational basis testing, require some identifiable relationship between residential and commercial property owners and the use of fire services to justify the invidiously disproportionate charges imposed upon them? (U.S. Const, Amd. XIV)**

For purposes of equal protection, the classifications contained in the Ordinance must be rational and reasonable, and grounded upon real differences. Said classifications must also bear a reasonable relationship to a proper governmental purpose and treat all persons within legitimate classifications similarly. Gibson v. West Virginia Dept. of Highways, 406 S.E. 2d 440 at 445 (W.Va. 1991). Stated another way, judicial inquiry under the equal protection clause (of the 14th Amendment) does not end with showing equal application among members of a class defined by the

legislature; the courts must reach and determine the question of whether the classifications drawn in the statute are *reasonable and rational in light of its* purpose. Carrington v. Nash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed. 2d 675 (1965); McGloughlin v. Florida, 379 U.S. 184 85 S.Ct. 283, 13 L.Ed 2d 222 (1964). As the following discussion will demonstrate, the classifications contained in the Ordinance are arbitrary and devoid of any apparent rationale.

A cursory review of the Ordinance (see. eg., A 107) reveals five classifications of fire service "users". [9]. In reality there are only three. No fee distinction is made in the Ordinances between (a) "Residential Unit Structure" and "Dual Residential Structure" and (b) "Multiple Family Residential Unit Structure". The classifications can thus be summarized as follows:

1. Residential Unit and Dual Unit Structures;
2. Multiple Family Residential Unit and Non-Residential Unit Structures;
3. Non-Residential Tenant Unit Structure.

(Depo. P. Shives at pp. 68-73, RR Vol. I, p. 82-87; Hearing Transcripts, 5-18-95, p. 38; RR Vol. IV, p. 38).

Because there are only three rate schedules, the creation of five classes of "users" in the first instance was arbitrary (RR Vol. IV, p. 38). These three "classes" and the classification of "residential" vs. "non-residential" generally, are neither reasonable nor rational in light of their purposes.

The City was asked in every possible way to provide Petitioners with some basis for the creation of the classifications in the Ordinance (Plaintiff's Answer to Defendants First Interrogatories at No.4, p 5; RR Vol. I p. 211; Plaintiffs' Answer to Defendants' Second

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[9] Residential unit structure, dual residential unit structure, multiple family residential unit structure, non-residential unit structure and non-residential tenant unit structure.

Interrogatories at No.1, p 1-2; RR Vol. I p. 226-227; and Depo. P. Shives, pp. 43, 82, 85, 88, 94-96, 101-102, RR Vol. I, pp. 57, 96, 99, 102, 108-110, 115-116). Under the evidentiary record of this case, not a single document, study, minute, record, communication or reason of any kind has been provided to the Petitioners in support of or which could justify a substantial distinction between any residential and non-residential structure or classification. Instead, the classifications are based on "discussions and conference sessions" where "no written record... and no minutes were taken" because they were not "official meetings" and "where there are no written documents concerning these meetings", and where no written study or analysis was done to assist Council in making this determination. (Plaintiff's Answer to Second Interrogatories at p. 1-2, RR Vol. I, pp. 226-227). Based thereon, it was agreed that "users of the service would be classified as residential users and non-residential users".

Petitioners however, are not relying on any conclusory allegations regarding past decisions. The City Manager, Paul Shives testified at his deposition that no study has ever been done comparing the cost of fire protection on residential versus non-residential structures.
(Depo. P. Shives, Tr. 94-95, RR Vol. I, pp. 108-109).

These "transparent classifications distinguishing between commercial and non-commercial enterprises (are) arbitrary and devoid of any apparent rationale". State, Ex. Rel. Miller vs. McDonald, 260 Ind. 565, 297 N.E. 2d 826, (1973), Cert. Den. 414, U.S. 414 U.S. 1158, 94, S.Ct. 917, 39 L.Ed. 111 (1974). See also, Clay County Citizens For Fair Taxation vs. Clay County Commission, 452 Se2d 724 (W.Va, 1995).

Because the classifications are not grounded upon any real differences and are thus arbitrary, the Ordinance per se discriminates against all class members in each and every classification.

Nonetheless, a pattern has emerged under the Ordinance where commercial owners and tenants have been singled out to bear the brunt of the costs of fire protection without any basis for doing so. First, the total fees where an owner of a non-residential structure leases space to a (third party) tenant are 150% of the total fees if an owner runs his own business (Depo. P. Shives at Tr. 80-82, RR Vol. I, pp. 94-96; RR Vol. II, pp. 270 et seq. and RR Vol. II, pp. 287, et seq). Second, the fees are consistently categorically higher to non-residential owners than to residential owners, and this premise is stated to be the legislative intent of the Ordinance. Third, the fees for "personal property" are included in all categories except those to non-residential tenants. The total fees to non-residential owners/ lessors are twice the total fees to residential owners/lessors. (Even if the "personal property" fees were not included as aforesaid, then only non-residential tenants would be required to pay a "personal property" fee). Fourth, only non-residential tenants are billed by the City for fire service fees (Depo. P. Shives, Tr. 107-108, RR Vol. I, pp. 121-122). In conclusion the City, through a clever manipulation of express fees and silent "personal property fees" is charging non-residential landlords twice the fee charged to residential landlords. The foregoing arguments demonstrate a pattern and policy on the part of the City of intentional and invidious discrimination against owners of commercial real property and their tenants.

VI. CONCLUSION

Petitioners wish to stress the fact that they are not adverse to reasonable and fair government taxation. In conclusion, Defendants' adopt by reference the profound concurring opinion by Justice McGraw in City of Fairmont vs. Pitrolo Pontiac-Cadillac, 308 S.E.2d 527 (W.Va. 1983). The following excerpt therefrom, however, cited by the Court in U.S. vs. Huntington, supra (A 95-96) is worth repeating:

"After diverting tax revenues into these new areas of governmental endeavor, government began charging its citizenry "fees" for the provision of traditional essential services. By attempting to call a spade a shovel, political leaders, pressed by the demands of diverse constituency groups within local governmental entities, have sought to avoid the will of the people that the growth of government be limited. Ironically, it was many of these same political leaders who helped spur passage of the Property Tax Limitation (Amendment) of 1982, W. Va. Const. Art. X, §1b, which further constrained the ability of local governments in West Virginia to raise revenue. To wiggle off the sharp hook which they have fashioned for themselves, these political leaders now turn to the Court and ask it to label a 'tax' a 'fee'. Engaging in this type of subterfuge and sophistry is nothing new to West Virginia where avoiding limitations on revenue-raising ability is concerned."

Respectfully submitted,

Thomas G. Eddy, Esquire
Counsel for Petitioners